



## Decision

**Matter of:** SDA Inc.  
**File:** B-256075; B-256206  
**Date:** May 2, 1994

James H. Roberts, III, Esq., Manatt, Phelps & Phillips, for the protester.

Leigh Ann Holt, Esq., General Services Administration, for the agency.

Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. The evaluation of proposals and the resulting determination as to whether a particular offeror is in the competitive range are matters within the discretion of the contracting agency; our Office will not substitute its judgment for the agency's regarding the relative merits of proposals but, rather, will examine the agency's evaluation to ensure that the evaluation was reasonable and consistent with the stated evaluation criteria.
2. Where protester's past performance is evaluated in part using information obtained by the agency through contact of protester-furnished references, contracting agency is permitted to rely on such information without allowing protester to rebut such information and without conducting an independent investigation as to the accuracy of the information obtained from the references.
3. Protest raising same issues as those resolved in decision on companion protest by the same protester and involving the same agency is summarily denied as no useful purpose would be served by further consideration of the protest.

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\*The decision issued May 2, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

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**DECISION**

SDA Inc. protests its exclusion from the competitive range under solicitation for offers (SFO) Nos. 93-07 and 93-17, issued by the General Services Administration (GSA) for office space. SDA principally argues in both protests that the agency misevaluated its past performance in determining not to include the firm within the competitive range. We deny the protests.

**SALT LAKE CITY LEASE**

GSA issued SFO No. 93-07 on November 5, 1993, seeking proposals for approximately 69,875 to 75,000 net-usable square feet of office and related space to house the Internal Revenue Service (IRS) in Salt Lake City, Utah. The SFO advised offerors that the competitive range would be established by the contracting officer on the basis of cost or price and other factors stated in the solicitation and will include "all offerors that have a reasonable chance of being selected for award." The SFO also stated that after review of best and final offers (BAFO), the lease would be awarded to the offeror whose offer was most advantageous to the government, price and other award factors considered. For evaluation purposes, the SFO provided that price would be of equal weight to the technical evaluation factors. These technical evaluation factors--five in all, listed in descending order of importance--were:

- A. Past Performance [DELETED]<sup>1</sup>
- B. Efficient Layout, Site Layout [DELETED]
- C. Quality [DELETED]
- D. Availability of Employee/Public Parking and Public Transportation [DELETED]
- E. Availability of Amenities [DELETED]

Concerning the most important technical evaluation factor, Past Performance, the SFO stated that this factor would consider the extent of the offeror's past experience in performing similar work as well as the quality of the offeror's past performance in terms of "timeliness and technical success." The SFO required each offeror to submit evidence of capability to perform, including evidence of experience, competency, and performance capabilities with

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<sup>1</sup>The actual percentage weights for each technical evaluation factor were set forth in the agency's source selection plan and were not disclosed to the offerors in the SFO.

construction similar in scope to the current project. As relevant here, the SFO stated, in part, that the following standard would be employed to evaluate each offeror under the Past Performance evaluation factor:

"[P]ast performance on . . . similar contracts [must have been] satisfactory, or better. In order to be considered satisfactory, the contractor must have completed the work on time and in accordance with all contract requirements. The individual(s) responsible for awarding and administering the similar contracts will provide the assessment of the contractor's performance. Current and/or former tenants may provide the assessment of services performed as part of the lease." [Emphasis Added.]

By the December 13, 1993, closing date for receipt of initial offers, GSA received nine proposals, including one from the protester. In its initial proposal, SDA identified four GSA office projects (with the IRS as tenants) that it had previously completed. The contracting officer forwarded all offers received to the agency's source selection evaluation team (SSET) for evaluation. On December 30, the contracting officer informed all offerors that the competitive range determination would not be announced until January 7 because the agency had experienced difficulties in reaching references for all offerors.<sup>2</sup> The individual evaluators completed their scoring of proposals on January 4; they filed a consensus technical evaluation report on January 6.<sup>3</sup> The evaluation results were as follows:

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<sup>2</sup>GSA states that although the protester identified four projects in its initial proposal that it had completed for GSA, the protester's proposal failed to contain telephone numbers or contacts for any of the listed projects. GSA contacted the protester to request reference contacts; the protester then provided names and telephone numbers for the four GSA projects.

<sup>3</sup>In the meantime, the agency, on January 5, prepared an abstract of offers containing the evaluated rates and prices for each offeror.

Offeror	Technical Score <sup>4</sup>	Evaluated Price (Per Square Foot)
Offeror A	[DELETED]	[DELETED]
Offeror B	[DELETED]	[DELETED]
Offeror C	[DELETED]	[DELETED]
Offeror D	[DELETED]	[DELETED]
Offeror E	[DELETED]	[DELETED]
Offeror F	[DELETED]	[DELETED]
SDA	285	20.25
Offeror G	[DELETED]	[DELETED]
Offeror H	[DELETED]	[DELETED]

The record shows that the protester's low overall score was principally the result of a very low score in the technical evaluation factor, Past Performance (the protester received 140 points out of a possible [DELETED] points).<sup>5</sup> The evaluation documents show that one evaluator contacted two references and asked the following questions with the following results:

"1. Have you worked with the SDA company/firm? If yes, would you work with them again?"

Reference A: "No, if have a choice."

Reference B: "No, quality is good but company spends a lot of time on minute details [and] will charge government for all possible delays."

"2. Was the contract fulfilled on time and in a professional manner?"

Reference A: "Contract on time but very difficult to work with."

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<sup>4</sup>The maximum technical score available was [DELETED] points. The technical evaluation factor, Past Performance, accounted for [DELETED] points.

<sup>5</sup>SDA also received a score of 0 points in the Availability of Amenities factor because it provided no information at all concerning this factor. SDA's scores under the other evaluation factors were good to average. In its protest concerning the evaluation of its own proposal, the protester principally focuses its arguments on the agency's evaluation of the most important "non-price criterion, Past Performance." We agree that the protester's low score under this criterion was the dispositive reason for the exclusion of its proposal from the competitive range.

Reference B: "Yes, on time [but] can't trust them to perform without a lot of hassle [and] unnecessary delays."

. . . . .

"4. Are you satisfied with the SDA company/firm?"

Reference A: "No, costs high, very pushy . . . difficult to deal with."

Reference B: "No, overall very difficult to work with." Another evaluator, after contacting the protester's references, noted in his evaluation worksheets:

"All references were very displeased with the building process and building management. I was seriously advised not to work with them. No good qualities identified."

The SSET's consensus evaluation report furnished to the contracting officer stated that SDA's "references [informed the agency's officials] that [SDA was] difficult to do business with and [was] not professional. All references stated they could not recommend this company."

The SSET recommended to the contracting officer, based on the technical evaluations, that the four highest technically rated offerors be included in the competitive range; SDA was not one of those firms. After consulting with various staff, the contracting officer determined, on January 6, that only three offerors (Offerors A, B, and D) would be included in the competitive range because they were "the best able to meet the SFO requirements." On January 7, the agency advised the protester that its proposal was excluded from the competitive range; this protest followed.

SDA argues that it has "extensive experience" in completing facilities of the type being acquired here and that, instead of focusing on the firm's past experience, quality, and technical success, the "GSA evaluators relied on unsubstantiated reports of matters having nothing to do with the quality and success of SDA's past performance." SDA argues that GSA evaluators "departed from matters relevant to the announced 'Past Performance' criterion" when they relied upon "irrelevant and unsupportable negative input received" from its references during the telephone calls that were made. The protester states that GSA is attempting to punish SDA for filing legitimate claims under the disputes provisions of prior contracts and that our Office

should not tolerate "this form of de facto debarment."<sup>6</sup> SDA requested a hearing to interrogate not only the evaluators but the individuals who were called by the agency as references, apparently to establish that the latter provided "scurrilous and unsupported negative information" about SDA's past performance which, according to the protester, was in fact satisfactory or better.

The evaluation of proposals and the resulting determination as to whether a particular offeror is in the competitive range are matters within the discretion of the contracting agency; our Office will not substitute its judgment for the agency's regarding the relative merits of proposals but, rather, will examine the agency's evaluation to ensure that the evaluation was reasonable and consistent with the stated evaluation criteria. See Smith Bright Assocs., B-240317, Nov. 9, 1990, 90-2 CPD ¶ 382; Travel Centre, B-236061.2, Jan. 4, 1990, 90-1 CPD ¶ 11.

Here, our review of the record shows that the agency followed the evaluation criteria. As stated above, the RFP essentially required the offerors to submit references to assess each offeror's past performance, including names and telephone numbers. The RFP advised offerors that these references would be contacted and used in evaluating each offeror's past performance, which was the technical evaluation area of paramount importance. An agency may request and consider references (including those furnishing negative reports) on past and present contract performance on relevant work to assess performance risk, where this

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<sup>6</sup>SDA states that it has never submitted a frivolous claim under a contract and that in some circumstances GSA contracting officers have invited SDA to submit a claim in order to resolve a contract dispute. SDA also states that further proof that its claims are not frivolous is the fact that GSA contracting officers "routinely grant SDA's claims outright or reach agreement through settlement negotiations." Finally, SDA states that it is prepared to produce settlement agreements and contract appeals board findings that its claims have never been frivolous and that SDA has "always conducted itself in a legal and professional manner during the administration of its contracts with GSA."

<sup>7</sup>As explained below, we find that the agency reasonably relied upon the references that the protester itself provided in response to the SFO. Since we do not think that the agency had to "go behind" the opinions expressed by the references and conduct further independent investigation as to the adequacy or quality of the protester's performance under four different contracts, we found a hearing unnecessary and denied the request.

criterion is specified among the evaluation criteria of the solicitation. Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407. The agency here contacted the references and received uniformly negative reports on the protester's performance.<sup>8</sup> While the protester argues that it is being penalized principally for filing legitimate claims, we think the references were very negative with respect to broader aspects of the protester's performance (for example, the evaluators noted that the references stated that the protester was "difficult to work with" and that they were "very displeased with the [protester's] building process and building management). In short, the record shows that the references uniformly and unequivocally recommended to GSA that the agency "not work with them." We think the agency reasonably relied upon these references and reasonably downgraded the protester's past performance rating.<sup>9</sup> We therefore have no basis to disturb the agency's award of only 140 points (out of a possible [DELETED] points) to the protester which effectively eliminated its proposal from the competitive range because of the relatively higher scores of the other offers in the competitive range primarily in this as well as other technical areas.<sup>10</sup>

SDA also argues that the contracting officer failed to adequately consider cost or price of the two lowest-priced offerors (SDA and Offeror F) in establishing the competitive

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<sup>8</sup>We also note that there is no legal requirement that all references listed in a proposal be checked. Questech, Inc., supra. The protester does not argue here that the agency improperly failed to contact references listed in its proposal--it simply disputes the negative reports the agency obtained from these references.

<sup>9</sup>We do not think the agency was required to conduct further investigation to independently establish the validity of the reports from the references. Reports from references are routinely relied on in commercial transactions, including ordinary consumer purchases. We fail to see why the government cannot follow ordinary commercial and consumer practices in selecting the most capable contractor. Consistent with this view, we have held that where offerors are required to list prior experience and the offerors are aware that the source of this experience may be contacted, the contracting agency may contact these sources and consider their replies without permitting the offerors to rebut the information and without further investigation into the accuracy of the information. See Schneider, Inc., B-214746, Oct. 23, 1984, 84-2 CPD ¶ 448.

<sup>10</sup>Offerors A, B, and D, which were placed in the competitive range, had very good or excellent references.

range. First, although SDA was the lowest-priced offeror, a contracting agency may disregard an offeror's low price if the agency reasonably determines that the proposal should be excluded from the competitive range for technical reasons. See Intown Properties, Inc., B-249036.3, Jan. 15, 1993, 93-1 CPD ¶ 45; Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94.<sup>11</sup> Second, SDA is not an interested party to raise the issue of the propriety of the agency excluding another low-priced offeror from the competitive range. Intown Properties, Inc., supra.<sup>12</sup>

We deny the protest.

#### LAKEWOOD, COLORADO LEASE

SFO No. 93-17 was issued on September 17, 1993, and, as amended, sought proposals for approximately 116,416 to 122,236 net-usable square feet of office space in Lakewood, Colorado. The SFO stated that award would be made to the offeror whose proposal was most advantageous, price and other factors considered. Price was less important than the combination of the following technical factors: (1) building/site location [DELETED]; (2) building quality [DELETED]; (3) building interior [DELETED]; and (4) past performance [DELETED]. Concerning past performance, the SFO required references and stated that "the individual(s)

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<sup>11</sup>The protester argues that the competitive range document shows that the agency selected those offerors "best able to meet SFO requirements," rather than all offerors that had a "reasonable chance of being selected for award." We think this argument is semantical. Once the agency received the negative references, the agency was not required to discuss these perceived deficiencies with the protester, see Saturn Constr. Co., Inc., B-236209, Nov. 16, 1989, 89-2 CPD ¶ 467, and the protester, with its low past performance scores, would not have had a reasonable chance for award.

<sup>12</sup>Counsel for the protester received, under a protective order, the agency report which included the proposals of all competitive range offerors. In its comments on the agency report, SDA argues at length that Offeror A, which received the highest technical score ([DELETED] points) and was one of the competitive range offerors, submitted its proposal late, did not submit a legally binding offer, did not submit information on past performance, and otherwise submitted a defective proposal. While the protester's arguments may or may not be valid, the protester would not be in line for award or be properly included within the competitive range regardless of whether Offeror A was also eliminated. Therefore, the protester has no direct economic interest in advancing these arguments. See 4 C.F.R. § 21.0(a) (1993).



responsible for awarding or administering the [prior] contracts will provide the assessment of the offeror's performance."

Under this SFO, SDA submitted two proposals (the same proposed building to be constructed at either one of two locations) and provided GSA with the identical four references as under the solicitation discussed above.<sup>13</sup> GSA apparently received identical or similar negative reports from these references. Specifically, the source selection board (SSB) recommended against including SDA in the competitive range, based in substantial part on the following reason concerning past performance obtained from the references:

"Consensus Rating (0 x 20) = 0.<sup>14</sup> References stated that he "low balls" offers and has many claims to get money out of the deal. He inundates the contracting officer with frivolous information. Write[s] up to two letters a day with several points each and assumes that no immediate response equals acceptance of the items. Changes major items at the last minute. Change order costs are excessive. In general difficult to work with."

SDA was not included in the competitive range for deficiencies in the past performance factor as well as other factors, and this protest followed.

In support of its position, SDA argues the identical or virtually identical arguments it advanced in the Salt Lake City lease protest. For example, SDA argues that it is a premier developer of office buildings, that GSA improperly relied upon "unsubstantiated reports of matters having nothing to do with the quality and success of SDA's Past Performance," that it has not filed frivolous claims, that GSA is attempting to punish SDA for filing legitimate claims, and that GSA's evaluation of past performance was otherwise irrational.

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<sup>13</sup>GSA received 10 proposals initially; five proposals from three offerors were eventually determined to be within the competitive range.

<sup>14</sup>Under the agency's source selection plan, a rating of 0 equated to a rating of "unacceptable-unsatisfactory performance on past contracts as reported by the individuals awarding the past contracts."

The arguments and issues raised by the protester are identical or nearly identical to the issues we have already resolved in its other protest set forth above. Since the issues and arguments made by SDA in this protest are the same as in the previous protest discussed and resolved above, we see no useful purpose to be served by our further consideration of this protest ground or the repetition of our legal conclusions set forth previously. This protest ground is summarily denied. See Wallace O'Connor, Inc., B-227891, Aug. 31, 1987, 87-2 CPD ¶ 213.

The record shows that GSA also awarded SDA 0 points under the technical evaluation criterion, building quality. Among other things, GSA found that SDA's proposed building "is basically a box design with little creativity." We have examined SDA's proposal and conclude that the proposed building is "box-like" and could reasonably be viewed as aesthetically undesirable. We think such aesthetic judgments by the agency are inherently subjective, and we have no basis to disturb GSA's judgment in this regard.

In view of the protester's very negative references, and in view of its aesthetically undesirable proposed building, we cannot conclude that GSA was unreasonable in not including SDA in the competitive range. Accordingly, we find no merit in this protest.

The protests are denied.

Robert P. Murphy  
Acting General Counsel